NO. 80-2081

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM T. OSBORNE and BIG T PHARMACY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (No. 80-5248)

PETITION FOR WRIT OF CERTIORARI

BEN W. HOOPER II
406 East Main Street
Newport, Tennessee 37821
615-623-3082

Attorney for Petitioners

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

6-4-81-50

QUESTIONS PRESENTED FOR REVIEW

QUESTION I

Did the Court err in overruling the motion to quash the Administrative Inspection Warrant, and thus the Search Warrant subsequently issued, because of the facts that the inspection warrant was not issued upon affidavit as required by 21 U.S.C. 880 (d), there was no showing of probable cause for its issuance and the said inspection warrant did not state sufficient grounds for its issuance?

QUESTION II

Did the Court err in overruling the motion for a judgment of acquittal as to the petitioner, William M. Osborne, under Count 6 of the indictment, on the ground that there is insufficient evidence to sustain the verdict, the only evidence being that William M. Osborne was the president of Big T Pharmacy, Inc.?

QUESTION III

Did the Court commit reversible error in making certain comments on the evidence and in asking certain questions so as to adversely affect the credibility of the defense in the presence of the jury?

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21 C.F.R. 1316.13 . . . . . 4, 5, 8

NO. _____

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, William M. Osborne and Big T Pharmacy, Inc., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered against them on April 8, 1981.

OPINIONS BELOW

There was no opinion in the United States District Court other than the judgment of conviction which was entered. A copy of the Memoranda Opinions and Orders entered in the District Court relative to the motion to suppress appears at Appendix, infra p. A-1.

The opinion of the Court of Appeals, as yet unreported, appears at Appendix, infra p. A-7.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) to review the order of the United States Court of Appeals for the Sixth Circuit entered on April 8, 1981.

STATUTES AND REGULATIONS INVOLVED

The statute involved in this matter is 21 U.S.C. 880 (d), which provides as follows:

> **Administrative inspection warrants; issuance; execution; probable cause**
>
> (d) Issuance and execution of administrative inspection warrants shall be as follows:
>
> (1) Any judge of the United States or of a State Court of record, or any United States magistrate, may, within his territorial jurisdiction, and upon proper oath or affirmation showing probable cause, issue warrants for the purpose of conducting administrative inspections authorized by this subchapter or regulations thereunder, and seizures of property appropriate to such inspections. For the purposes of this section,

the term "probable cause" means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant.

(2) A warrant shall issue only upon an affidavit of an officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate and establishing the grounds for issuing the warrant. If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of such inspection, and, where appropriate, the type of property to be inspected, if any. The warrant shall identify the items or types of property to be seized, if any. The warrant shall be directed to a person authorized under subsection (b) (2) of this section to execute it. The warrant shall state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof. It shall command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified, and, where appropriate, shall direct the seizure of the property specified. The warrant shall direct that it be served during normal business hours. It shall designate the judge or magistrate to whom it shall be returned.

(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate allows additional

time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) The judge or magistrate who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made.

Pub.L. 91-513, Title II, § 510, Oct. 27, 1970, 84 Stat. 1274.

The regulations involved in this matter are 21 CFR 1316.09 (a) (4) (i), (ii), and 21 CFR 1316.13, which provide as follows:

§ 1316.09 Application for administrative inspection warrant.

(a) An administrative inspection warrant application shall be submitted to any judge of the United States or of a State court of record, or any United States magistrate and shall contain the following information:

* * *

(4) A statement that the establishment either:

(i) has not been previously inspected, or

(ii) was last inspected on a particular date.

* * *

§1316.13 Frequency of administrative inspections.

Except where circumstances otherwise dictate, it is the intent of the Administration to inspect all manufacturers of controlled substances listed in schedules I and II and distributors of controlled substances listed in schedule I once each year; and to inspect all distributors of controlled substances listed in schedules II through V and manufacturers of controlled substances listed in schedules III through V once every 3 years.

STATEMENT OF THE CASE

This is an appeal by the petitioners, William M. Osborne, hereinafter referred to as Osborne, and Big T Pharmacy, Inc., hereinafter referred to as Big T, from a conviction in the United States District Court for the Eastern District of Tennessee, Northeastern Division, Judge Charles G. Neese, presiding, on a six count indictment charging the petitioner,

Osborne, with five counts of unlawfully distributing controlled substances in violation of Title 21, U.S.C., Section 841 (a) (1) and one count of failure to keep and maintain sufficient records in violation of Title 21, U.S.C. Section 843 (a) (4). Petitioner, Big T, was charged with violation of Title 21, U.S.C., Section 843 (a) (4), failure to keep and maintain sufficient records.

Both Osborne and Big T were convicted of failure to keep and maintain sufficient records in violation of Title 21, U.S.C., Section 843 (a) (4). As alleged in Count 6 of the indictment, and Osborne, in addition thereto was convicted in Count 4 of unlawfully distributing "Darvon". Osborne was acquitted in Counts 1, 2, 3, & 5.

Osborne was sentenced for a period of two years and two days and a fine of $2,000.00 with the term of imprisonment to be followed by a special parole term of one year as to Count 4, and as to Count 6 Osborne was placed on probation for a term of three years consecutive to the sentence imposed in Count 4.

Big T was ordered to pay a fine in the amount of Five Thousand ($5,000.00) Dollars.

The original indictment in this case was dismissed and a new indictment returned. Petitioners, prior to trial, had filed a motion to quash an administrative inspection warrant and a search warrant and to suppress evidence resulting therefrom. This motion was overruled. The testimony and argument of counsel given at this hearing on the motion to quash and suppress is separately filed as a part of the transcript in this cause.

A substantial portion of the testimony offered in this case dealt with Counts 1, 2, 3 and 5, on which the petitioner, Osborne, was acquitted, but with respect to Count 4 the following testimony and evidence was given:

H. D. Leighty, pharmacy investigator for the Tennessee Board of Pharmacy, said on March 29, 1979, he presented a piece of paper with a prescription number on it to a pharmacist at Big T and requested a refill. The pharmacist was Osborne. He told Osborne he had a headache and Osborne filled the prescription and in addition gave him 30 "Darvon" capsules. In spite of this testimony, Mr. Leighty, on cross examination, said he could not recall whether he gave the piece of paper to Osborne or a Mr. Mills on March 29, 1979. Osborne denied giving Mr. Leighty any "Darvon" on March 29, 1979.

With respect to Count 6, Pink Frederick Anderson related most all of the relevant testimony concerning the manner in which an audit was conducted at Big T Pharmacy covering a period of January 1, 1978 to October 10, 1979, and seven (7) controlled substances, revealing a shortage thereof to the extent of 864,045 dosage units.

REASONS FOR GRANTING THE WRIT

The application for Inspection Warrant and the Warrant for Inspection are found in the Appendix, infra p. A-9 and A-12, respectively.

Both the District Court and the Court of Appeals have erroneously upheld an inspection warrant which was not lawfully issued upon affidavit as required by Section 21 U.S.C. 880 (d), and which was issued without a showing of probable cause and without a statement of sufficient grounds for its issuance.

It is readily conceded that the requirements for the issuance of an inspection warrant are not nearly as stringent as for a fourth amendment search warrant, but if the

inspection warrant in this case is upheld it will stand for the proposition that there are absolutely no requirements for the issuance of an inspection warrant and that the applicable statutes and regulations need not be followed. Such a holding is contrary to every case cited thus far in this litigation.

The application for the inspection warrant in this case must according to the provisions of 21 U.S.C. 880 (d) (2) establish the grounds for issuing the warrant and further it is provided that the warrant shall state the grounds for its issuance. Neither of these requirements are met in the case at bar.

The only items mentioned in the application which could be considered as grounds for the issuance of a warrant are the first three which merely show that drugs are packed at Big T Pharmacy, Inc., that said establishment was previously inspected about three years ago, and that this inspection is undertaken as part of the statutorily authorized inspection program designed to assure compliance with the Comprehensive Drug Abuse Prevention and Control Act of 1970. What is there in these three items that would constitute grounds for anything. The one that would come closest to being considered a ground is the one indicating the establishment had previously been inspected approximately three years ago, and even this is in violation of 21 C.F.R. 1316.09 (a) (4) (i), (ii) which says that an application for such a warrant should contain a statement that the establishment either has not been inspected previously or was last inspected on a particular date. Also 21 C.F.R. 1316.13 says it is the intent of the DEA to conduct inspections once every three years.

Now turning to the warrant itself we find that it finds that probable cause was shown and two grounds for its

issuance are listed. Petitioners contend vigorously that neither is really a ground for anything, they are just statements. They show no probable cause in any manner.

It is still insisted that the statutory provisions must be followed. In *U. S. v. Pugh*, D.C. Mich. 1976, 417 F.Supp. 1019, the Court said:

> "Scheme established by provisions of this section relating to requirements of inspection warrants is reasonable protection in important area of rights under U. S. Const., Amend. 4 and federal agents should be trained to comply with its provisions."

In the case of *Camara v. Municipal Court*, 387 U.S. 532, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), cited in the warrant in this case as authority for its issuance, it is clearly recognized that "probable cause to issue a warrant to inspect must exist". The Court also indicated "that warrants should normally be sought only after entry is refused."

In the case of *United States v. Montrom*, (1972, D.C. Pa.) 345 F.Supp. 1337, aff'd without opinion (C.A. 3) 480 F. 2d 918, and aff'd without opinion 480 F.2d 919, the Court said that the standard of probable cause required in the statute was satisfied by a showing of mammoth purchases of drugs.

In the case of *U. S. v. Goldfine*, 538 F.2d 815 (1967), the Court upheld the inspection by warrant on the ground that probable cause was justified, but there were in fact reasons given for the inspection, such as, "This establistment has not been previously inspected".

Lastly this Court needs to distinguish this case as one governed by 21 U.S.C. 880, the warrant requirements of which are less than a requirement of Aguilar-Spinelli

probable cause, but more than those situations where warrantless inspections have been authorized.

Turning now to Question II, it is insisted that the evidence in this case is indeed insufficient to sustain a verdict of guilty as to Osborne under Count 6. How can any one person be held accountable for the acts of a corporation merely because he is the president. The evidence in this case did not show that the records were incomplete because of any act or omission on the part of Osborne. A conviction cannot be sustained on negative testimony. *U. S. v. Devereaux*, 442 F.2d 862.

Osborne insists that the application of the new rule laid down in *Jackson v. Virginia*, 99 S.Ct. 2781, requires a reversal in this case because due process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

In this case, knowledge is an essential element as was charged by the Court. If Osborne was not responsible for the shortage, how could he keep or not keep a record of such shortage.

The government witnesses, Charles Beach, and DEA Compliance Investigator Pink Frederick Anderson, both testified that the only way to know of such a shortage would be to go through the 35,000 prescriptions on file.

Lastly, the Court charged that it must be proved that the petitioner was a registrant dispensing controlled substances, when the proof showed that at the time of the audit and as of June 11, 1979, Charles Beach was the registrant. Apparently, at all other times petitioner, Osborne, was the registrant, but there is no proof as to when the shortage

occurred. All of these things are pointed out to show the insufficiency of the evidence.

The last question raised by the petitioner is whether or not the Court committed reversible error in making certain comments on the evidence and in asking certain questions so as to adversely affect the credibility of the defense in the presence of the jury.

The comments, questions and conduct of which petitioners complain are found in the Appendix, infra p. A-15-A-17.

The first incident was the Court asking the witness, Charles Beach, if he had ever heard of such shortages of that proportion over a period of twenty-two months. This was highly improper and prejudicial for the Court to so inquire. The Court seemed to even attempt to qualify the witness to answer such questions. These comments amounted to testimony on the part of the Court when he repeatedly emphasized that the shortage was of such a great proportion.

The second incident occurred when the Court admonished counsel not to "mislead" the witness and the jury.

The third incident occurred when the Court asked the petitioner, "You mean as president of this organization you don't know who is working?" and "Don't you know who was working or about how many?" The remarks of the Court in this particular situation amounted to an indication on the part of the Court that the petitioner was evading answering questions or had a poor memory or was not telling the truth.

It is insisted that all of the above were disparaging remarks and/or conduct discrediting the defense and highly improper. It's reversible error inasmuch as it is not consistent with the concept of a fair trial.

In *U. S. v. Allsup*, 566 F.2d 68, C.A. Ariz. 1977, the Court said that a district court must be mindful that, in the eyes of the jury, the court occupies a position of preeminence and special persuasiveness and, thus, the court must avoid the appearance of giving aid to one party or another.

Trial Judge must be conscious of the special attention and respect he commands from the jury and therefore caution in maintaining an appearance of impartiality must be exercised. *U. S. v. Vega*, 589 F.2d 1147, C.A. N.Y. 1978, and *U. S. v. Lamont*, 565 F.2d 212, cert. denied 98 S.Ct. 1467, 435 U.S. 914, 55 L.Ed.2d 505.

In commenting upon testimony, judge may not assume role of witness; he may analyze and direct the evidence, but he may not distort it or add to it, and deductions and theories not warranted by the evidence should be studiously avoided in expressing opinion on evidence. *U. S. v. Blevins*, 555 F.2d 1236 (1977).

A trial judge must use caution in questioning a witness since his position as judge carries overpowering weight before jury.

When the attorneys are competently conducting their cases, it is improper for the trial judge to question the witness.

It is the further contention of the petitioners that this was a close case and that the slightest error would be most significant and damaging.

CONCLUSION

Petitioners urge that Question I presented herein certainly raises a question which needs to be settled by the Court. It needs to be made clear what is required in the way of grounds for and probable cause to issue an inspection warrant issued under the provisions of 21 U.S.C. 880. With respect to Question II presented herein it appears that the District Court and the Court of Appeals for the Sixth Circuit have allowed a conviction to stand on insufficient evidence and/or negative testimony and in conflict with the case of *Jackson v. Virginia*, 99 S.Ct. 2781. Likewise, it appears that the District Court and the Court of Appeals for the Sixth Circuit have permitted improper comments and questioning by the trial judge in conflict with the many decisions of our federal courts requiring the trial judge to maintain an appearance of impartiality.

Lastly, it has been felt that the large amount of drugs unaccounted for in the facts of this case has had an adverse effect to the petitioners, and it is wished that this Court will not lose sight of the true questions involved merely because of the substantial drug shortage involved in this case.

Respectfully submitted,

BEN W. HOOPER, II
406 East Main Street
Newport, Tennessee 37821
Telephone No. 615-623-3082

Attorney for Petitioners

Appendix

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

[Filed JUL 7, 1980]

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. CR-2-80-3
WILLIAM OSBORNE, et al.,	)	
Defendant.	)	

MEMORANDA OPINIONS AND ORDERS

The prosecution filed herein on June 20, 1980 a bill particularizing everything to which the Court thinks the defendants Mr. Osborne and Big T Pharmacy, Inc. are entitled to inform them of the nature of the respective charges against them with sufficient precision to enable them to prepare for trial, to avoid or minimize the danger of surprise at trial, and to enable each of them to plead his or its acquittal or conviction in bar of another prosecution for the same offenses. *See United*

[2]

States v. Birmley, C.A. 6th (1976), 529 F. (2d) 103, 108 [12]. Accordingly, the motion of such defendants for a bill of particulars hereby is

DENIED.

The motion of the same defendants for a dismissal of the indictment herein on the ground of " * * * vagueness and indefiniteness * * * " hereby is

DENIED. *Hamling v. United States* (1974), 418 U.S.

87, 117-118, 94 S.Ct. 2887, 41 L.Ed. (2d) 590, 620-621 [25-27].

In connection with the charges against the defendants Mr. Osborne and Big T Pharmacy, Inc. contained in a prior indictment herein, the Court held a pretrial evidentiary hearing on the motion of those defendants to suppress certain evidence seized pursuant to an inspection-warrant. See Rule 12 (b) (3), Federal Rules of Criminal Procedure. It is stipulated that, in lieu of an evidentiary hearing on the identical pending motion of such defendants, the Court may consider the evidence developed at the prior hearing, and that such evidence may be made part of the record on the pending indictment. The Court so does, and it so is.

[3]

The movants attack the inspection-warrant issued by a magistrate of this district pursuant to a provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 880 (d). That specific provision authorizing a warrant for an inspection prevails over the more general warrant provision for a search and seizure of Rule 41, Federal Rules of Criminal Procedure. See *Gooding v. United States* (1974), 416 U.S. 430, 447, 94 S.Ct. 1780, 40 L.Ed. (2d) 250, 262, n. 27 [1]. It is not contended by the movants that the inspection-warrant is deficient under the Constitution, Fourth Amendment; only that its issuance was not accompanied obediently to the pertinent statutory requisites. Of the various specific grounds advanced in support of such motion, only 2 merit discussion.

It is contended that the "affidavit"[1] presented to the magistrate who issued the inspection-warrant, and upon

which he based his finding of

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[1]The facts set forth by the agent in support of his application for the inspection-warrant were contained in the application itself. Although there was no separate document entitled "affidavit," the Court deems this merely a matter of form rather than substance. Clearly, the factual matters set forth in the application for the warrant were sworn to before the magistrate. The Court sees no error merely because the magical word "affidavit" was not utilized.

[4]

probable cause, was insufficient for that purpose. Applying the criteria reiterated recently in *United States v. Hatfield*, C.A. 6th (1979), 599 F. (2d) 759, this Court cannot say that the magistrate's finding of probable cause was arbitrary.

Within the meaning of 21 U.S.C. § 880 (d)((1), probable cause, sufficient to justify the issuance of an inspection-warrant, may be established by the mere fact that a substantial period of time has passed since the most recent inspection of the particular establishment. *United States v. Prendergast*, D.C. Pa. (1977), 436 F.Supp. 931, 932 [1], affirmed C.A. 3d (1978), 585 F. (2d) 69; *United States v. Greenberg*, D.C. Pa. (1971), 334 F.Supp. 364, 367; *see Camara v. Municipal Court* (1967), 387 U.S. 523, 538, 87 S.Ct. 1727, 18 L.Ed. (2d) 930, 940-941 (the passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant.[2]) As a part of the statutory

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[2]The legislative history of the Act makes clear that its warrant requirements were inserted into the statute in deference to the Supreme Court's decisions in Camara, supra, and See v. Seattle (1967), 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. (2) 943. House Report No. 91-1444 reprinted in 3 U. S. Code Cong. & Admin. News (1970), 91st Cong., 2d Sess.

[5]

scheme involved, regulations of the Drug Enforcement Administration contemplate the inspection of each regulated establishment " * * * once every 3 years. * * * " 21 C.F.R. § 1316.13.

Among the facts sworn to before the magistrate, prior to his issuance of the warrant herein, was that the Big T Pharmacy, Inc. had been inspected previously " * * * approximately three years ago. * * * " While the date of the last inspection of this establishment could better have been stated more precisely,[3] the magistrate obviously could have inferred reasonably from the facts before him that a substantial period of time had passed since the last inspection of the Big T Pharmacy, Inc. Accordingly, a predicate existed for the magistrate's finding of probable cause, and that finding is conclusive. *United States v. Giacalone*, C.A. 6th (en banc, 1976), 541 F. (2d) 508, 513 [3].

It was required that the inspection-warrant issued herein " * * * state the grounds for its issuance and the name of the person or persons

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[3] Cf. 21 C.F.R. § 1316.09 (a) (4) (i), (ii), stating that an application for such a warrant should contain a statement that the establishment either has not been inspected previously or " * * * was not (sic) [last] inspected on a particular date."

[6]

whose affidavit has been taken in support thereof. * * * " 21 U.S.C. § 880 (d)(2). The movants complain that this warrant is deficient because it does not state adequately the grounds for its issuance. Assuming, without deciding, that the warrant is deficient in this regard, that does not justify the application of the rule excluding the evidence discovered in the execution of the warrant.

At the time 21 U.S.C. § 880 (d) was enacted, Rule 41 (c), Federal Rules of Criminal Procedure, contained an almost identical provision which required a search warrant to " * * * state the grounds for its issuance and the names of the persons whose affidavits have been taken in support thereof. * * * " In 1972, however, that rule was amended so as to delete those requirements. The purpose of such amendment was to eliminate unnecessary paperwork. 3 Wright, Federal Practice and Procedure: Criminal, 1979 Suppl. 693, n. 76.1. The elimination of the need for the inclusion of such information on the face of a search warrant was insignificant because anyone desiring to attack the validity of the warrant was given access to the affidavit upon which the warrant had been issued. *See Idem.* Apparently, however, Congress

[7]

did not eliminate the comparable provision contained in 21 U.S.C. § 880 (d)(2).

In a case arising under former Rule 41 (c), *supra*, the Court of Appeals for this Circuit refused to apply the exclusionary rule, so as to bar evidence seized by officers acting pursuant to a search warrant, merely because the issuing magistrate had failed to state completely on the warrant the names of the persons whose affidavits had been taken in support thereof. *United States v. Nolan*, C.A. 6th (1969), 413 F.2d 850. The Court noted therein that the exclusionary rule was aimed at implementing the purpose of the Constitution, Fourth Amendment. *Ibid.*, 413 F.2d at 853. However, that rule clearly " * * * was not designed to correct the administrative errors of a United States Commissioner [now Magistrate]. Rather, it was intended to prevent violation of the Fourth Amendment by police officers who willfully failed to seek judicial authority for search warrants. * * * " *Ibid.*, 413 F.2d

at 854 [3]. Thus, our appellate court concluded that the purposes underlying the exclusionary rule had been vindicated when the law enforcement officers made an application for and received a warrant from the proper

[8]

judicial authority upon sworn evidence showing probable cause, even 'though there may have been a technical deficiency on the face of the warrant itself.' *Ibid.*, 413 F. (2) at 854 [4]. This Court is of the opinion that the rationale followed in *Nolan*, *supra*, is applicable to any possible deficiency on the face of the warrant herein as to the necessary statement of the grounds for its issuance.

If the right of the people of this nation to be free from unreasonable searches and seizures is to have substantial viability, our law-enforcement officers must be encouraged to conduct their searches and make seizures pursuant to warrants issued by detached judicial officers. " * * * A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. * * * " *United States v. Ventresca* (1965), 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed. (2d) 684, 689. One of the better ways to foster the increased use of warrants is to give law-enforcement officials the assurance that, when a warrant is obtained in a close case, its validity will be upheld. *United States v. Hatfield*, *supra*, 599 F. (2d) at 761.

[9]

The motion to suppress hereby is

OVERRULED.

ENTER:

/s/ C. G. NEESE
(C. G. Neese)
United States District Judge

(Filed April 8, 1981)

NO. 80-5248

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA)
)
Plaintiff-Appellee)
)
v.)
)
WILLIAM M. OSBORNE and BIG T PHARMACY)
)
Defendants-Appellants)

ORDER

BEFORE: LIVELY and MERRITT, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

This is an appeal by a pharmacy and its president from convictions of failure to maintain records of controlled substances, 21 U.S.C. § 843(a)(4), and of the president, Osborne, of unlawfully distributing controlled substances, 21 U.S.C. § 841(a)(1).

Upon consideration of the record on appeal together with the briefs and oral arguments of counsel the court concludes that the district court did not err in denying the motion to quash an inspection warrant and a search warrant. The court also concludes that there was sufficient evidence from which the jury could find the defendant Osborne guilty beyond a reasonable doubt of the charge that he violated 21 U.S.C. § 843(a)(4). The court has also examined the contention that the trial judge made prejudicial remarks in the presence of the jury and finds no

basis for reversal in the statements and questions of the judge.

Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

NO. 79-0219M

IN THE MATTER OF Administrative Inspection of Big-T Pharmacy, Inc. Route 6, Knoxville Highway Newport, Tennessee 37821	APPLICATION FOR INSPECTION WARRANT UNDER THE FEDERAL COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970 (P.L. 91-513) TITLE 21, U.S.C., SECTION 880

To: United States Magistrate
United States District Court
Eastern District of Tennessee

Pink Fredrick Anderson, a duly authorized Compliance Investigator of the Drug Enforcement Administration, Department of Justice, Nashville, Tennessee, hereby applies for an inspection warrant, pursuant to Section 510 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513), (Title 21, United States Code, Section 880), for the inspection of the establishment as follows:

Big-T Pharmacy, Inc.
Route 6, Knoxville Highway
Newport, Tennessee 37821

1. Drugs or other substances included in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513) (Title 21, United States Code, Section 811) are packed or held in this establishment.

2. The establishment has previously been inspected

pursuant to the Comprehensive Drug Abuse Prevention and Control Act of 1970 approximately three years ago. PFA RPM

3. This is an inspection undertaken as a part of a statutorily authorized inspection program designed to assure compliance with the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513).

4. The inspection will be conducted within regular business hours. The Compliance Investigator's credentials will be presented to the registrant as prescribed in Section 510 of the Act. The inspection will begin as soon as practicable after the issuance of this warrant and will be completed with reasonable promptness.

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5. The inspection will extend to the establishment and all pertinent equipment, finished and unfinished materials, containers and labeling therein, and all books and records required to be maintained by law.

6. Samples and/or records will be seized when necessary to a reasonable inspection and receipt will be given therefor.

7. The Compliance Investigator named hereinbefore may be accompanied by one or more DEA Special Agents, also duly authorized by the Drug Enforcement Administration, Department of Justice. The Compliance Investigator may be accompanied by one or more State of Tennessee Board of Pharmacy Investigators.

8. A return will be made to the Court at the completion of the inspection.

9. The authority for the issuance of the inspection warrant is Section 510 of the Comprehensive Drug Abuse

Prevention and Control Act of 1970 (P.L. 91-513), *Camara v. Municipal Court*, 387 U.S. 523 (1967), *See v. Seattle*, 387 U.S. 541 (1967) and *Colonnade Catering Corporation v. United States*, 397 U.S. 72 (1970).

Sworn to and subscribed by

/s/ PINK FREDRICK ANDERSON
PINK FREDRICK ANDERSON,
Compliance Investigator
Drug Enforcement Administration

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

No. 79-0219M

IN THE MATTER OF Administrative Inspection of Big-T Pharmacy, Inc. Route 6, Knoxville Highway Newport, Tennessee 37821	WARRANT FOR INSPECTION UNDER THE FEDERAL COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970 (P.L. 91-513) (TITLE 21 U.S.C. SECTION 880)

To: PINK FREDRICK ANDERSON, and any other authorized Compliance Investigator and/or Special Agent of the United States Drug Enforcement Administration:

Application having been made, and probable cause shown, by Compliance Investigator Pink Fredrick Anderson, United States Department of Justice, Drug Enforcement Administration, for an inspection of the establishment described as:

Big-T Pharmacy, Inc.
Route 6, Knoxville Highway
Newport, Tennessee 37821

Based upon the following grounds:

1. This is an inspection of an establishment registered under Title II of this Act which has been previously inspected.

2. Pursuant to Section 510 of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513) and the decisions of the Supreme Court in *Camara v. Municipal Court*, 387 U.S. 523 (1967), *See v. Seattle*,

387 U.S. 541 (1967), and *Colonnade Catering Corporation v. United States*, 397 U.S. 72 (1970), you are authorized to enter the above-described premises at a reasonable time during ordinary business hours, and to inspect in a reasonable manner and to a reasonable extent, including the collection of samples if necessary, the establishment and all pertinent equipment, finished and unfinished materials, containers and labeling therein, and seizure of all books and records required to be maintained by law, if necessary.

A prompt return shall be made to this Court no later than 10 days from the date of issuance of this warrant.

/s/ ROBERT P. MURRIAN
UNITED STATES MAGISTRATE

Dated: October 9, 1979
2:45 PM

Warrant for Inspection

RETURN

I received the attached inspection warrant on October 9, 1979 and have executed it as follows:

On October 10, 1979 at 9:30 o'clock A.M., I served the warrant on Charles Beach at Big-T Pharmacy, Newport, Tn . I left a copy of the warrant with Big-T Pharmacy . During the period from October 10, 1979 to October 17, 1979 I, or persons under my supervision, conducted an inspection of files, records and controlled substances at the premises shown above.

The following items were seized pursuant to the warrant:

10 yellow caps of phentermine 30 mg
marked 172

Return made by /s/ Pink Fredrick Anderson on
(Signature)
10/17/79. Subscribed and sworn to and returned before me this 17th day of Oct. 1979.

/s/ ROBERT P. MURRIAN
UNITED STATES MAGISTRATE

(Caption Omitted)

EXCERPTS FROM TESTIMONY OF CHARLES BEACH

(July 8, 1980)

QUESTIONS ASKED BY COURT

THE COURT: Mr. Beach, I believe you said you had been a pharmacist about nine years?

THE WITNESS: Yes, sir.

THE COURT: How many different drug stores have you worked around to be familiar with it?

THE WITNESS: Probably in that nine year period I have worked at a dozen different drug stores.

THE COURT: I guess you talked with other pharmacists, did you ever hear of a shortage of 850,000 dosage units at any of those stores at any time over a period of 22 months, approximately 22 months?

THE WITNESS: Not that I recall, your Honor.

THE COURT: None of them?

THE WITNESS: No, sir.

THE COURT: Did you ever hear any other pharmacist say anything about a shortage of that proportion in that period of time?

THE WITNESS: I have heard other pharmacists discuss it, yes.

THE COURT: How many?

THE WITNESS: Various stores around, maybe Chattanooga, Nashville, bigger towns mostly, or maybe sometimes a warehouse loss or something of that nature.

THE COURT: What about a drug store in the community the size of Newport, did you ever hear of any loss in that period of time of that proportion?

THE WITNESS: I don't recall, no, sir.

THE COURT: You think you would have?

THE WITNESS: I think probably, yes.

THE COURT: Any additional questions in view of the Court's questions? (Transcript 146-147)

(Caption Omitted)

EXCERPTS FROM TESTIMONY OF
PINK FREDERICK ANDERSON

(July 8, 1980)

REMARKS BY THE COURT

Q Mr. Gibson didn't volunteer to sign anything and refused to talk to you, didn't he?

A We have a DEA Form 13, called "Statements of Rights Waiver," and he either initialled or signed the statement form, but he took the Fifth Amendment.

Q Which meant he refused to talk with you?

A Yes, about activities of Big T Pharmacy.

THE COURT: As he had a right to do, Mr. Hooper. Let's not mislead him.

MR. HOOPER: I wasn't thinking about misleading him. I just asked the question.

THE COURT: I don't want the jury to be misled by your question.

MR. HOOPER: I don't want that either.

THE COURT: Ladies and gentlemen, a person has a right when asked about possible violation of the law, under our Constitution, not to answer. That is a right you have, and I have, and Mr. Gibson had. It is a good thing we have it. (Transcript 177).

(Caption Omitted)

EXCERPTS FROM TESTIMONY OF
WILLIAM M. OSBORNE

(July 8, 1980)

QUESTIONS AND REMARKS BY COURT

Q I am not asking for specifics. I am asking on the average, did Mr. Beach ordinarily work more than two days a month?

A I would have to check and see even to average it out.

THE COURT: You mean as president of this organization you don't know who is working?

THE WITNESS: Sometimes he worked two days.

THE COURT: He is asking you the average. He is not asking you for a detailed picture. He is asking you on the average. You were president of the corporation for those entire 22 months, weren't you?

A Yes, sir.

Q Don't you know who was working or about how many?

A I would say he worked about two days a week.

THE COURT: That is what he is asking you.
(Transcript 209-210).